IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRENDA MARIE JOHNSON, Appellant.	No. 37510-9-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury entered a verdict finding Brenda M. Johnson guilty of five counts of first degree theft by deception for withdrawals she made at various Washington Mutual (WAMU) branches from a line of credit belonging to Leslie and Brenda L. Johnson. Johnson appeals her conviction and sentence arguing that sufficient evidence does not support her convictions. Specifically, she argues that sufficient evidence does not support a jury finding that she used deception to obtain the funds. Johnson also argues that the trial court erred at sentencing by not finding that her five theft convictions encompassed the same criminal conduct for purposes of calculating her offender score. Johnson further argues that her trial counsel was ineffective at sentencing for failing to argue that her theft convictions encompassed the same criminal conduct. We affirm.

FACTS

Johnson worked as a telephone banker for WAMU from December 13, 2004 to April 19, 2005.[1]

On June 21, 2005, Johnson entered a WAMU located inside a Fred Meyer grocery store at 72nd and Pacific in Tacoma, Washington and requested $2,500 from a line of credit belonging to Leslie and Brenda L. Johnson. Because there were fees owing on the line of credit, a WAMU employee told Johnson she had to pay $185.56 before accessing the funds. Johnson wrote a $185.56 check that later bounced. She received the $2,500 in the form of cash.

Johnson made four more withdrawals from Leslie and Brenda L. Johnson's line of credit, each time receiving the money in the form of a bank check. On June 23, 2005, Johnson returned to the same Tacoma branch and withdrew $6,000. On June 24, 2005, Johnson went to the Twin Lakes branch of WAMU in Federal Way, Washington and withdrew $7,000. On June 27, 2005, Johnson went to the Benson Plaza branch of WAMU in Renton, Washington and withdrew $7,000. On June 29, 2005, Johnson returned to the Tacoma branch and withdrew $10,000. Johnson admitted at trial that she gambled 98 percent of the money away.

Each time Johnson withdrew money from the line of credit, she presented her driver's license and a second form of identification, both of which contained her full name "Brenda Marie Johnson."

When Leslie and Brenda L. Johnson received their June 2005 bank statement, they noticed the cash withdrawals and immediately called WAMU. They did not know Johnson and did not

[1] Before working for WAMU, Johnson worked in various positions for other banks. Johnson worked for five years as a personal banker for U.S. Bank beginning in 1993. She also worked for approximately a year at Key Bank and for a short time at SeaFirst Bank.

give her permission to access their account. Leslie and Brenda L. Johnson completed a forgery affidavit on July 26, 2005. Rachel McCarter, a fraud investigator for WAMU, began investigating the unauthorized withdrawals on August 8, 2005.

The Tacoma Police Department notified Johnson that she was under investigation for theft. On May 17, 2006, Johnson voluntarily met with Tacoma Police Detective David Paul at the Tacoma Police Department headquarters. Although she was not under arrest, Paul advised Johnson of her *Miranda*[2] rights, which she waived. Paul showed Johnson WAMU security photographs of her engaging in the five transactions described above along with documents associated with those transactions. Johnson admitted that she was the person in the photographs and that she made those transactions. But Johnson claimed that unknown persons in Nigeria contacted her by email and directed her to access the WAMU account.

Johnson testified at trial that she began receiving emails from Nigeria in 2004 telling her that she inherited a large sum of money, in the millions, from an unknown relative who died in a plane crash. The emails informed Johnson that she had to send the Nigerian contacts a certain sum of money so "they could deliver the funds from a safety deposit box to [her] front door." Report of Proceedings (RP) (Feb. 11, 2008) at 117. Johnson also corresponded with the Nigerian contacts by telephone. Johnson undertook certain actions to verify the existence of the inheritance such as contacting Econo Bank, the Nigerian bank alleged to be holding the inheritance. She also contacted various couriers such as Fed Ex and UPS to inquire about delivery options. Johnson further testified that after approximately a year of email correspondence, the Nigerian contacts provided her with a WAMU account number and told her

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

"to go into Washington Mutual, show [her] ID, and [she] could access those funds." RP (Feb. 11, 2008) at 118. Johnson stated that she did not send any money to Nigeria because the various Nigerian contacts began arguing amongst themselves about where she should send the money. Johnson then "became agitated, didn't know who [she] was supposed to trust; wondering, okay, what's really going on?" RP (Feb. 11, 2008) at 133. Johnson never sent any of the funds to Nigeria; instead, she gambled most of the money away.

Johnson forwarded some of these emails to Detective Paul, but she claimed that there were several emails that she could no longer access on her computer because she previously deleted them. None of the emails forwarded to Paul mention WAMU, Leslie and Brenda L. Johnson's account number, or instructions on how to access their line of credit.

Although Johnson testified on direct examination that the five withdrawals she made from June 21, 2005 to June 29, 2005, were the only five times she accessed the account, she later revealed on cross-examination that she accessed the line of credit while still employed at WAMU, prior to June 2005. She testified that she withdrew $7,000 from the line of credit, gambled with it and won $10,000, then deposited the entire $10,000 back into the account.

On April 23, 2007, the State charged Johnson with one count of first degree theft by deception, contrary to RCW 9A.56.020(1)(b) and 9A.56.030(1)(a). On February 6, 2008, the State amended the charging document to charge a separate count of first degree theft for each transaction made by Johnson. On February 12, 2008, a jury entered a verdict finding Johnson guilty of five counts of first degree theft. The trial court held a sentencing hearing on March 26, 2008. At sentencing, the State asserted that Johnson's sentencing range was between 12 and 14 months. Johnson's defense counsel did not refute the State's assertion regarding Johnson's

sentencing range and did not argue that her convictions encompassed the same criminal conduct. The trial court assigned Johnson an offender score of four and sentenced her to 12 months and a day, the bottom of her standard range sentence, with credit for 276 days served. Johnson timely appeals her conviction and sentence.

ANALYSIS

Sufficiency of the Evidence

Johnson first argues that sufficient evidence does not support her first degree theft convictions. Specifically, she argues that the State did not present sufficient evidence that she acted with deception when she made withdrawals from Leslie and Brenda L. Johnson's line of credit. We disagree.

Sufficiency of the evidence is a question of constitutional magnitude that a defendant may raise for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). In determining whether sufficient evidence supports a conviction, "[t]he standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990) (citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable for purposes of drawing inferences. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact's resolution of conflicting testimony and evaluation of the persuasiveness of the evidence. *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997) (citing *State v. Walton*, 64 Wn.

App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992)). In other words, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In order to convict Johnson of first degree theft by deception, the State had to prove that Johnson, (1) by color or aid of deception, (2) obtained control over another's property (3) valued at more than $1,500 (4) with intent to deprive the person of the property. RCW 9A.56.020(1)(b), .030(1)(a); *State v. Heffner*, 126 Wn. App. 803, 810, 110 P.3d 219 (2005). Johnson argues that sufficient evidence does not support the first element of a first degree theft by deception conviction, that she acted by color or aid of deception.

"Deception" occurs when an actor knowingly (a) creates or confirms another's false impression which the actor knows to be false, (b) fails to correct another's impression which the actor previously has created or confirmed, or (c) prevents another from acquiring information material to the disposition of the property involved. RCW 9A.56.010(5)(a)-(c); *State v. Leffingwell*, 106 Wn. App. 835, 842, 25 P.3d 484, *review denied*, 145 Wn.2d 1009 (2001). A person acts knowingly when (1) she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (2) she has information that would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense. RCW 9A.08.010; *State v. Perebeynos*, 121 Wn. App. 189, 196, 87 P.3d 1216 (2004). A jury may infer knowledge from circumstantial evidence. *Perebeynos*, 121 Wn. App. at 196 (citing *State v. Johnson*, 119 Wn.2d 167, 174, 829 P.2d 1082 (1992)).

Here, the State presented sufficient evidence from which the jury could infer that Johnson knowingly deceived the bank into believing that Leslie and Brenda L. Johnson's account belonged

to her when she made the five withdrawals. First, any reasonable juror could infer that

Johnson gained access to Leslie and Brenda L. Johnson's account number through her experience as a WAMU telephone banker. The State presented evidence that Johnson worked as a WAMU telephone banker from December 13, 2004 to April 19, 2005. As a WAMU telephone banker, Johnson had the ability to access all WAMU customer names and account numbers including line of credit accounts. The jury could also reasonably infer that Johnson knew the account did not belong to her because she stopped making withdrawals shortly before the end of June and, given her experience as a WAMU telephone banker, she knew the rightful owners of the line of credit account would receive a statement showing her June withdrawals.

The State also presented sufficient evidence that Johnson created a false impression that she was the "Brenda Johnson" listed as co-owner on the line of credit account. Any reasonable juror could find that Johnson asserted to WAMU employees that she was the rightful owner of the line of credit each time she entered a WAMU branch by requesting funds from the account. The jury could also infer that Johnson furthered this deception by signing her name without her middle initial, despite her testimony that she usually signs with a middle initial on legal documents, and by using three different WAMU branches to access the funds.

Johnson asserts that there was not sufficient evidence that she acted knowingly to deceive because she thought she had permission to access the funds based on her Nigerian email correspondence. But Johnson's argument goes to the persuasiveness of her defense, not to whether the State presented sufficient evidence that she acted knowingly to deceive. And we defer to the trier of fact on issues related to the persuasiveness of the evidence. *Hernandez*, 85 Wn. App. at 675. Further, even if the jury chose to believe Johnson's testimony, that Nigerian contacts provided her with the account number and directed her to access it, the jury could have

found that she nonetheless had information that would lead a reasonable person in the same situation to believe she did not have permission to access the account. RCW 9A.08.010; *Perebeynos*, 121 Wn. App. at 196-97.

Johnson argues that sufficient evidence does not support a jury finding that she attempted to deceive the bank because she presented her own picture identification that included her full name. But the fact that Johnson used her own identification does not negate any reasonable inference that she intended to deceive the bank into believing that the account belonged to her. Johnson could have believed that the WAMU employees would not notice that her middle name differed from the middle name on the account; a fact that the various WAMU employees and supervisors apparently did not notice.

Because sufficient evidence supports a jury finding that Johnson knowingly deceived WAMU employees into believing that Leslie and Brenda L. Johnson's account belonged to her, we affirm Johnson's first degree theft convictions.

Offender Score Calculation

Johnson also contends that the trial court erred in determining her offender score at sentencing by not finding that her five theft convictions encompassed the same criminal conduct. The State argues that Johnson is precluded from raising this challenge for the first time on appeal. We agree with the State.

A. Mootness

As an initial matter, it appears that Johnson has been released from incarceration and is not subject to any community custody conditions. It would thus appear that her sentencing challenge is moot under our decision in *State v. Harris*, 148 Wn. App. 22, 197 P.3d 1206 (2008). But

under our Supreme Court's decision in *State v. Vike*, 125 Wn.2d 407, 409 n.2, 885 P.2d 824 (1994), Johnson's sentencing challenge is not moot under these circumstances.

In *Harris*, we addressed whether Harris's sentencing challenge, that the trial court erred in calculating his offender score because the State failed to prove the validity of previous out-of-state convictions with certified judgments, was moot because Harris was released into the community and was not subject to any community custody conditions. 148 Wn. App. at 26-27. In holding that Harris's sentencing challenge was moot, we first acknowledged that a case is moot when a court can no longer provide effective relief. *Harris*, 148 Wn. App. at 26. We then found that we could not provide relief to Harris because "he has been released from confinement, is not on community custody, and is not subject to another miscalculation based on this alleged error if he is convicted of another crime in the future." *Harris*, 148 Wn. App. at 26.

Harris recognized that future sentencing courts may not simply rely on a criminal history from a previous judgment. 148 Wn. App. at 28. Instead, the sentencing court must calculate the defendant's offender score on "'the date of sentencing for the offense for which the offender score is being computed.'" *Harris*, 148 Wn. App. at 27 (quoting RCW 9.94A.525(1)). Further, if a defendant objects to his criminal history at sentencing, the State must again prove prior convictions by the preponderance of evidence with either a certified judgment and sentence or, if none is available, other comparable evidence. *Harris*, 148 Wn. App. at 27 (citing *State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007)). And "a prior judge's criminal history computation is not evidence of a certified judgment and sentence." *Harris*, 148 Wn. App. at 27.

The *Harris* mootness analysis did not address a challenge to an offender score calculation on the basis that the trial court should have found that multiple convictions encompassed the same

criminal conduct. Our Supreme Court noted that a similar challenge might not be moot in *Vike*. 125 Wn.2d at 409 n.2. In *Vike*, our Supreme Court addressed whether Vike's concurrent counts of simple possession of two or more controlled substances encompassed the same criminal conduct. 125 Wn.2d at 409. Our Supreme Court reached the merits of Vike's offender score challenge despite its recognition that Vike had completed his 90-day sentence,[3] noting that "[s]hould Vike ever be sentenced again under the Sentencing Reform Act of 1981, RCW 9.94A, the question of how these two convictions should be scored will arise." *Vike*, 125 Wn.2d at 409 n.2. Because Johnson's offender score challenge more closely resembles the challenge presented in *Vike* than the challenge presented in *Harris*, we do not rely on the mootness doctrine and address Johnson's offender score challenge here.[4]

B. Waiver

The State asserts that Johnson waived her right to appeal whether her convictions encompassed the same criminal conduct by not raising the issue below. Johnson concedes that she stipulated to both her offender score and to the calculation of her current offenses, but argues that her trial counsel was deficient for failing to advise Johnson of the consequences of stipulating to her offender score and for failing to argue to the trial court that her convictions encompassed the same criminal conduct. We agree with the State.

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[3] The *Vike* court did not address whether Vike was subject to community custody conditions.

[4] We note the tension between the doctrine of collateral estoppel and the requirement under RCW 9.94A.345 that sentencing courts recalculate an offender score in accordance with the law in effect at the time of the current offense. *Compare* RCW 9.94A.345 ("Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.") *with State v. Blakey*, 61 Wn. App. 595, 811 P.2d 965 (1991) (doctrine of collateral estoppel barred offender from challenging previous sentencing court's determination that his offenses were not the same criminal conduct at a later sentencing hearing).

Generally, issues not raised in the trial court may not be raised for the first time on appeal. RAP 2.5(a); *State v. Moen*, 129 Wn.2d 535, 543, 919 P.2d 69 (1996). A defendant may, however, argue for the first time on appeal that her sentence is in excess of statutory authority when based upon a miscalculated offender score because "a defendant cannot agree to punishment in excess of that which the Legislature has established." *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). Although waiver does not apply to a legal error leading to an excessive sentence, "waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." *In re Goodwin*, 146 Wn.2d at 874.

A sentencing court has statutory authority to find that multiple convictions encompassed the same criminal conduct. RCW 9.94A.589(1)(a). RCW 9.94A.589(1)(a) states in part:

> [W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. . . . "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

Application of the same criminal conduct statute by a trial court is not mandatory and involves both factual determinations and the exercise of discretion. *State v. Nitsch*, 100 Wn. App. 512, 523, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030 (2000); *see also In re Goodwin*, 146 Wn.2d at 875 (approving of the *Nitsch* waiver analysis). Thus, a defendant cannot stipulate to her offender score and then argue for the first time on appeal that her multiple convictions encompassed the same criminal conduct. *In re Pers. Restraint of Shale*, 160 Wn.2d 489, 494-95,

158 P.3d 588 (2007); *Nitsch*, 100 Wn. App. at 514. Accordingly, Johnson has waived the issue of whether her convictions encompassed the same criminal conduct by failing to timely raise the issue below.

Ineffective Assistance of Counsel

Johnson asserts that she may nonetheless raise the constitutional issue of ineffective assistance of counsel. She argues that her trial counsel was ineffective by failing to argue to the trial court that her five first degree theft convictions encompassed the same criminal conduct. We disagree.

To establish ineffective assistance of counsel, Johnson must show that (1) her counsel's performance was deficient and (2) the deficient performance resulted in prejudice. *State v. Woods*, 138 Wn. App. 191, 197, 156 P.3d 309 (2007) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). We give great deference to trial counsel's performance and begin our analysis with a strong presumption that counsel was effective. *Woods*, 138 Wn. App. at 197 (citing *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999)).

Multiple offenses encompass the same criminal conduct if the crimes involve the same (1) objective criminal intent, (2) time and place, and (3) victim. RCW 9.94A.589(1)(a). If any of these three elements are missing, the trial court must count the offenses separately when calculating a defendant's offender score. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). We will not disturb a trial court's same criminal conduct decision absent an abuse of discretion or misapplication of the law. *State v. Burns*, 114 Wn.2d 314, 317, 788 P.2d 531

(1990).

Here, Johnson clearly cannot meet the same time and place requirement. Johnson first argues that she meets the "same time" element because the thefts took place over a short period of time (eight days). To support her argument that the five thefts took place at the same time, Johnson cites *State v. Porter*, 133 Wn.2d 177, 942 P.2d 974 (1997). In *Porter*, the defendant was found guilty of three counts of delivery of a controlled substance. 133 Wn.2d at 179. Two of these convictions involved an incident in which an undercover officer purchased methamphetamine from Porter and immediately thereafter purchased marijuana from Porter. *Porter*, 133 Wn.2d at 179. Our Supreme Court held that the trial court erred by not considering two of Porter's "delivery of a controlled substance" convictions as the same criminal conduct, notwithstanding the fact that the two deliveries did not occur simultaneously. *Porter*, 133 Wn.2d at 182. In so holding, our Supreme Court noted that "Porter's sequential drug sales occurred as closely in time as they could without being simultaneous. The sales were part of a continuous, uninterrupted sequence of conduct over a very short period of time." *Porter*, 133 Wn.2d at 183. Here, in contrast, Johnson's thefts occurred over multiple days and cannot be characterized as a "continuous, uninterrupted sequence of conduct." Also, in *Porter*, the deliveries took place at the same location, whereas here, Johnson's thefts took place at three different WAMU branches. Because Johnson's five first degree theft convictions did not occur at the same time and place, they are not the same criminal conduct, and any motion Johnson's counsel would have made to the contrary would have failed. Thus, Johnson fails to show that her trial counsel was ineffective.

Accordingly, we affirm Johnson's convictions and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

VAN DEREN, C.J.

PENOYAR, J.